Supreme Court, U.S.
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Nos. 05-361 & 05-368

IN THE

Supreme Court of the United States

LEE KARR,

Petitioner,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

JOSEPH DALTON, ET AL.,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

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QUESTION PRESENTED

Whether the New York Supreme Court, the New York Appellate Division, Third Department, and the New York Court of Appeals all erred in holding that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq., preempted the application of New York state law to gaming activities occurring on Indian lands.

PARTIES TO THE PROCEEDINGS

The parties before the New York Court of Appeals included Joseph Dalton, Frank Padavan (individually and in his capacity as a member of the New York State Senate), William Parment (individually and in his capacity as a member of the New York State Assembly), Duane Motley, New Yorkers for Constitutional Freedoms, Ltd., Lee Karr, Mrs. Lee Karr, the Coalition against Casino Gambling, G. Stanford Bratton, the Western New York Coalition Against Casino Gambling, John Ekman, the Presbyterian and New England Congregational Church, Chaskiel Rozenburg, George Pataki (in his capacity as Governor of New York), the State of New York, the New York State Racing and Wagering Board, Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.), the New York State Department of Taxation and Finance (Division of the Lottery), Arthur J. Roth (in his capacity as Commissioner of Taxation and Finance of the State of New York), the New York Racing Association, the Finger Lakes Racing Association, Yonkers Racing Corporation, Mid-State Raceway, Inc., and Monticello Raceway Management Inc.

RULE 29.6 STATEMENT

Respondent Park Place Entertainment Corporation, which name was changed to Caesars Entertainment, Inc., was subsequently acquired and merged into Harrah's Operating Company, Inc., a Delaware corporation with its principal place of business in Nevada. Harrah's Operating Company, Inc. is a wholly-owned subsidiary of Harrah's Entertainment, Inc., a publicly traded company.[1]

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[1] Petitioner Karr incorrectly claims that Park Place (now known as Harrah's Operating Company, Inc.) is the parent corporation of the Hilton Hotel Chain. *See* Karr Pet. ii. There is no accuracy to any part of this allegation.

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BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

Respondent Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.) ("Park Place") respectfully submits this brief in opposition to the petitions for a writ of certiorari filed in this case.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals (Karr Pet. App. A; Dalton Pet. App. D) is reported at 2005 WL 1017641 (May 3, 2005). The opinion of the New York Appellate Division, Third Department (Karr Pet. App. B; Dalton Pet. App. E) is reported at 11 A.D.3d 62, 780 N.Y.S.2d 47 (3d Dep't 2004). The opinion of the New York Supreme Court (Karr Pet. App. C; Dalton Pet. App. F) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 3, 2005. Timely petitions for rehearing were denied on July 6, 2005, and the instant petitions were docketed on September 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTES AND RULES

25 U.S.C. § 2710(d)(1) provides:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

STATEMENT OF THE CASE

Petitioners are a collection of anti-gambling interest groups, activists and legislators who seek to invalidate New York State legislation that would permit New York's Governor to enter into tribal-state compacts for the operation of a limited number of Indian gaming casinos in New York State. The claims presented in the instant petitions have been rejected by the New York Supreme Court, by the New York Appellate Division, Third Department, and by the New York Court of Appeals.

At the very most, by their petitions, petitioners have raised an uncomplicated question about federal pre-emption—namely, whether the Indian Gaming Regulatory Act ("IGRA") pre-empts the application of certain state-law limits on gaming to gaming activities occurring on Indian lands. Although petitioners attempt to portray this case as one in which Congress improperly "empowered" state legislatures to enact laws they could not have enacted otherwise, the only question actually presented here is whether New York's general prohibition on "commercial" gambling as it applies to Indian tribes is pre-empted by IGRA—and the answer to this question is plainly yes. Indeed, petitioners' "state sovereignty" arguments ring hollow in light of the fact that IGRA gives the states a power—the ability to exercise some degree of regulation over gaming activities on tribal lands—that they would not otherwise possess under the United States Constitution.

No court, federal or state, has ever accepted the arguments petitioners present here. The decision below does not conflict with any case, and there is simply no reason for this Court to grant review. For these reasons and the other reasons explained here, these petitions should be denied.

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1. Since the days of Chief Justice Marshall, it has been established law that Indian tribes possess powers of inherent sovereignty in our federal system. *See Johnson v. McIntosh*, 21 U.S. 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). It is the Federal Government, through the Indian Commerce Clause and its treaty-making power, *see* U.S. Const. Art. I, § 8, cl. 3; *id.* Art. II, § 2, cl. 2, that exercises authority over Indian tribes and their activities. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). "The whole intercourse between the United States and [Indian] nation[s], is, by our Constitution and laws, vested in the government of the United States." *Id.* at 169 (quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

This Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" and that "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (citations omitted). Thus, the only way "state laws may be applied to tribal Indians on their reservations [is] if Congress has expressly so provided." *Id.*

2. Until the late 1980s, the law was unclear as to the degree to which gaming activities on Indian lands could be regulated by the states. In 1987, this Court squarely addressed this issue in *California v. Cabazon Band of Mission Indians*.

There, pursuant to ordinances approved by the United States Secretary of the Interior, two federally recognized Indian tribes (the Cabazon and Morongo Bands of Mission Indians) conducted bingo and card games on their reservations in California. *See* 480 U.S. at 204-05. The State of California objected to these gaming operations and sought to enforce against the tribes a California statute that imposed prize limits and limited bingo operators to unpaid members of charities. The tribes brought an action seeking an injunction and declaratory judgment that state laws could not be enforced on their reservations. In response, California argued that it had jurisdiction over the tribes pursuant to Public Law 280, which granted states limited criminal jurisdiction over offenses committed on tribal lands. *See id.* at 204-08.

This Court held that whether a state could enforce its law on an Indian reservation depended on whether the law was "criminal/prohibitory" or "civil/regulatory" in nature. *Id.* at 209. The Court determined that if a state law "generally" were to "prohibit certain conduct," it would fall within Public Law 280's grant of jurisdiction and be considered "criminal/prohibitory." *Id.* However, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and cannot be enforced on Indian land. *Id.* As the Court explained, the fact that a regulatory law is enforceable by both civil and criminal penalties does not make it a criminal law for purposes of jurisdiction. *See id.* at 209, 211.

Applying this analysis to the Indian tribes' activities in California, this Court found that California law permitted a wide variety of gaming activities, including the state lottery, certain card games, pari-mutuel betting on horse races, and bingo. *See id.* at 210-11. Therefore, the Court ruled that because California "regulates rather than prohibits gambling in general and bingo in particular," the Indian tribes were enti-

tled to engage in such gaming activities on their lands, free of regulation by the state. *Id.* at 211.

3. In the wake of this Court's decision in *Cabazon*, in 1988, Congress enacted IGRA, which incorporated *Cabazon*'s "prohibitory/regulatory" distinction.

In enacting IGRA, Congress recognized that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue" and that "existing Federal law d[id] not provide clear standards or regulations for [this] conduct." 25 U.S.C. § 2701(1), (3) (2005). Congress also acknowledged "that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands." S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

The primary purpose of IGRA was to address these issues by providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (2005). Congress also sought to establish a framework to regulate Indian gaming and to protect the tribes from criminal and other corrupting influences. *See id.* § 2702(2). To accomplish these goals, Congress devised an elaborate scheme by which different types of gaming would be subject to different degrees of regulation. In addition, Congress established the National Indian Gaming Commission ("NIGC") to act as an independent federal authority to regulate gaming on Indian lands. *See id.* § 2702(3).

IGRA divides gaming into three classes. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, and is subject only to tribal regulation. *See* 25 U.S.C. § 2703(6) (2005). Class II gaming includes bingo and certain non-banking card games. *See id.* § 2703(7)(A). Banking card games such as "blackjack" and

"baccarat," any electronic "game of chance," and "slot machines" are expressly excluded. *Id.* § 2703(7)(B). Class II gaming is generally not subject to state regulation, but it is subject to tribal regulation and oversight by the NIGC. *See id.* § 2710(a)-(c). All other gaming, including casino-style gambling, is classified as Class III gaming. *See id.* § 2703(8).

Under IGRA, Class III gaming is lawful on Indian lands if the gaming activities are authorized by an ordinance or resolution adopted by the Indian tribe and approved by the Chairman of the NIGC, and the state in which the Indian lands are located "permits such gaming for *any* purpose by *any* person, organization, or entity," and that gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1) (emphasis added). Any Indian tribe within a state allowing Class III gaming activity may request the state to enter into negotiations for a tribal-state compact. Upon receiving this request, the state shall negotiate with the tribe in good faith. *See id.* § 2710(d)(3)(A).

If the state fails to negotiate in good faith, and the state waives its sovereign immunity from suit, *see Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the tribe may bring an action in federal district court seeking an order compelling the state to conclude a compact. *See* 25 U.S.C. § 2710(d)(7)(A)(i). If such an order is issued, but the state and tribe then fail to conclude a compact, the Secretary of the Interior may promulgate procedures, consistent with IGRA, for the conduct of Class III gaming by the tribe on Indian lands. *See id.* at § 2710(d)(7)(B)(iv) & (vii). If, instead, the state asserts its sovereign immunity to block such a lawsuit, after mediation, the Secretary of the Interior may promulgate "rules for the conduct of Class III Indian gaming" in that state. 25 C.F.R. §§ 291.1 *et seq.* (2005); *see also* 25 U.S.C. § 2710(d)(7)(B)(vii).

4. Although New York once prohibited gambling, New York now permits a wide array of gambling within the state, including state-sponsored lotteries, pari-mutuel betting on horse racing, and "games of chance" conducted by "charitable or non-profit organizations." N.Y. Const. Art. I, § 9. According to statistics available from the New York State Racing and Wagering Board, in 2002 alone, more than $460 million was wagered on charitable gaming activities conducted by 16,149 registered New York charitable organizations, including proceeds from 2,300 licensed "Las Vegas Nights."[2] Similarly, in 2003, $410 million was wagered on charitable gaming activities.[3] In addition, New York has permitted the Oneida Nation to operate the Turning Stone Casino in Verona, New York for the past decade, the St. Regis Mohawks to operate the Akwesasne Mohawk Casino in Franklin County near the Canadian border since 1999, and the Seneca Nation to operate the Seneca Niagara Casino in Niagara Falls for over two years.

5. The instant actions have their origins in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y.), *cert. denied*, 540 U.S. 1017 (2003), a case concerning the authority of the Governor of New York to enter into agreements with Indian tribes to permit casino gaming on their lands. In 1999, Governor Pataki and the St. Regis Mohawk Tribe entered into an agreement to amend a 1993 compact to allow the Mohawks to operate electronic casino gambling devices. Shortly after this amendment took effect, many of the same

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[2] New York State Racing and Wagering Board, Annual Report and Simulcast Report: Calendar Year 2002, at 37-38, *available at* http://www.racing.state.ny.us/about/annual.htm.

[3] New York State Racing & Wagering Board, Annual Report and Simulcast Report: Calendar Year 2003, at Letter from Chairman, *available at* http://www.racing.state.ny.us/about/annual.htm.

plaintiffs here filed complaints against the Governor and other state officials seeking a declaration that the 1993 compact and 1999 amendment were unconstitutional, alleging, among other things, that the Governor lacked the authority to enter into tribal-state compacts without prior legislative approval. The Governor contended that because IGRA preempted New York's laws against gambling, he did not need legislative authorization to enter into a tribal-state compact.

The Court of Appeals of the State of New York affirmed the decisions of the lower courts and invalidated the compact, finding that "[d]ecisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure." *Saratoga*, 100 N.Y.2d at 823, 798 N.E.2d at 1060, 766 N.Y.S.2d at 667. Noting that "the lower courts did not cite, let alone address, *Cabazon* or other possibly relevant cases," the court stated that "further development of the issue by the courts below is desirable, if not necessary." *Id.* at 825, 798 N.E.2d at 1062, 766 N.Y.S.2d at 669.

6. The legislation at issue here, Part B of Chapter 383 of the Laws of 2001 ("Part B"), was enacted in the aftermath of September 11, 2001 to address New York's immediate need for new sources of revenue. The Legislature found that "casinos will bring additional business and income to the economically depressed areas that agreed to host the facilities." (Record on Appeal at 363.) By enacting Part B, the New York Legislature responded to this need and the concerns of the Court of Appeals in *Saratoga* and provided the Governor with express authorization and guidelines for the execution of a limited number of tribal-state compacts.

On January 29, 2002, the Dalton and Karr petitioners filed these actions alleging, among other things, that Part B is "illegal and unconstitutional" because it violates the New York State Constitution, the United States Constitution, and

IGRA. On February 15, 2002, the parties in this action consented to Park Place's intervention as a defendant with respect to the claims involving Part B.

On July 17, 2003, the trial court granted summary judgment in defendants' favor and dismissed these complaints in their entirety. *See* Karr Pet. App. C; Dalton Pet. App. F. On July 7, 2004, the Appellate Division, Third Department, unanimously affirmed the trial court's opinion as to Part B and declared that provision to be constitutional. The Appellate Division held that because New York "'permits such gaming for any purpose by any person, organization or entity,' . . . the class III gaming at issue is properly the subject of a tribal-state compact and part B of chapter 383 of the Laws of 2001 authorizing the Governor to enter into such compacts is consistent with both IGRA and N.Y. Constitution, article I, § 9." *Dalton v. Pataki*, 11 A.D.3d 62, 83, 780 N.Y.S.2d 47, 64 (3d Dep't 2004), *aff'd*, 2005 WL 1017641 (N.Y. 2005).

On May 3, 2005, the New York Court of Appeals affirmed the decisions of the lower courts with respect to Part B and declared it constitutional in all respects. *See* Karr Pet. App. A; Dalton Pet. App. D. In its 6-1 decision, the court correctly found that "the State Constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact." Karr Pet. App. A at A13; Dalton Pet. App. D at 17a. The court recognized that, "[t]hrough IGRA, Congress has preempted the states in this area. Since New York allows some forms of Class III gaming--for charitable purposes--such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." Karr Pet. App. A at A12; Dalton Pet. App. D at 16a.

The New York Court of Appeals expressly rejected the petitioners' arguments that IGRA violated state sovereignty,

concluding that "[t]hrough IGRA the states are granted a certain degree of authority over Class III gaming that they otherwise would not have due to the sovereignty of Indian nations. Thus, through the compacting process, IGRA confers a benefit on the state by allowing it to negotiate and to have some input into how Class III gaming will be conducted." Karr Pet. App. A at A13; Dalton Pet. App. D at 17a. Indian gaming is permitted in New York "with or without the state's involvement. Given the consequence, obviously state involvement and regulation is to be favored." Karr Pet. App. A at A14; Dalton Pet. App. D at 19a.

The court therefore concluded that "since 'as a matter of criminal law and public policy' Class III gaming activity is not prohibited in New York, and although heavily regulated, it is permitted for charitable and other purposes, IGRA's mandate allows the State to play an important and essential role in regulating gambling on Indian lands." Karr Pet. App. A at A32; Dalton Pet. App. D at 33a.

REASONS FOR DENYING THE WRIT

I. Contrary To Petitioners' Claim, There Are No Conflicts Over IGRA-Related Questions That Are Presented By This Case

Petitioners now proclaim "widespread conflict" where there is none. Moreover, they ask this Court to resolve IGRA-related questions that are not presented by this case.

The Dalton petition asserts a conflict between the decision below and decisions of other courts "regarding the extent of IGRA preemption." Dalton Pet. 11. However, neither these courts nor any others have reached conflicting conclusions as to whether IGRA pre-empts state laws as applied to Indian gaming. As the United States Senate stated when it enacted IGRA, the Act "is intended to expressly *preempt* the field in the governance of gaming activities on Indian lands.

Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." S. Rep. No. 100-446, at 6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 (emphasis added). None of the cases cited by petitioners have held to the contrary.

The Dalton petitioners cite a conflict between the New York Court of Appeals decision here and *Hotel Employees & Restaurant Employees International Union v. Davis*, 981 P.2d 990 (Cal. 1999), but that case is readily distinguishable. In *Hotel Employees*, the California Supreme Court invalidated an initiative statute that purported to authorize certain forms of gaming at Indian casinos because, pursuant to California's constitution, the people by initiative did not have the power to authorize those particular games. In contrast, here, the New York Court of Appeals determined that the Legislature had the power to authorize gaming compacts with Indian tribes and, through Part B, properly delegated the authority to negotiate such compacts to the Governor. *See* Karr Pet. App. A at A17; Dalton Pet. App. D at 21a-22a. Moreover, unlike the initiative in *Hotel Employees*, Part B does not purport to authorize the Governor of New York to enter into compacts with Indian tribes for games not permitted to be conducted by any other parties under New York law. *See* Karr Pet. App. A at A11 n.4; Dalton Pet. App. D at 16a n.4. Therefore, there is no conflict between the decision here and *Hotel Employees* for this Court to resolve.

Other cases cited by petitioners to demonstrate a purported "conflict" are even farther afield. They concern separation of powers issues not presented by this case. In *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 (R.I. 1995), the Supreme Court of Rhode Island held that absent specific authorization from the General Assembly, under Rhode Island's separation of powers, the Governor of Rhode Island did not have the authority to bind the state to a tribal-

state compact. *See id.* at 282. Notably, the court stated that it "offer[ed] no opinion regarding the rights of any of the parties to engage in and conduct Class III gaming under the Indian Gaming Regulatory Act or to renew negotiations to legally produce a tribal-state compact as contemplated by the provisions of the Gaming Act." *Id.* Similarly, in *State ex. rel Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), the Supreme Court of Kansas held that, although the Governor had the authority to negotiate with Indian tribes for a tribal-state compact, he lacked the power to bind the state to a compact in the absence of a delegation of power or approval of the compact by the state legislature. *See id.* at 1185. In New York's case, this separation of powers issue was resolved by the New York Court of Appeals' decision in *Saratoga*, which found that the Governor did not have the authority to enter into compacts with Indian tribes in the absence of authorization from the New York State Legislature. 100 N.Y.2d at 824, 798 N.E.2d at 1061, 766 N.Y.S.2d at 668. By enacting Part B, the Legislature expressly granted that necessary authority to the Governor.

The decision below also does not conflict with the Seventh Circuit's decision in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005). In *Lac Courte*, the Seventh Circuit examined IGRA's gubernatorial concurrence requirement for taking lands into trust for the benefit of Indian tribes and found that, although the power to take lands into trust rests with the Secretary of the Interior, Congress could make that authority contingent on the concurrence of a state actor, here the Governor. Contrary to petitioners' contention, the court there never reached the question of whether IGRA pre-empted state laws concerning Indian gaming. Rather, it simply found that, with respect to IGRA's land-in-trust provisions at issue there, Congress "reserv[ed]

the ultimate execution of that policy to the federal government." *Id.* at 663.[4]

As the New York Court of Appeals and many other courts have held, "IGRA has preempted the field in the area of Indian gaming." Karr Pet. App. A at A7; Dalton Pet. App. D at 12a; *see also Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). Petitioners have cited no case that conflicts with that conclusion or any other conclusion reached by the New York

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[4] Other cases cited by petitioners stand for the unremarkable proposition, consistent with IGRA, that where a particular type of game is absolutely prohibited to all within a state, it can also be prohibited for Indian tribes. *See Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310-11 (10th Cir. 2004) (finding that some courts have applied a "game-specific" approach in analyzing whether states must negotiate with tribes to conduct certain types of gaming); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1260 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996) (holding that California was not obligated to negotiate with Indian tribes over banked or percentage card games because those forms of Class III gaming were illegal for any person under state law, but remanding the case to the district court to determine "whether California permits the operation of slot machines in the form of the state lottery or otherwise," such that the state would have to negotiate with tribes regarding that Class III activity); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) ("We agree with the state that it need not negotiate traditional keno if only video keno is permitted in South Dakota."); *American Greyhound Racing v. Hull*, 146 F. Supp. 2d 1012, 1063 (D. Ariz. 2001) (holding that where a form of Class III gaming is prohibited by a state, a state is not required to negotiate for the conduct of that gaming with Indian tribes), *vacated*, 305 F.3d 1015 (9th Cir. 2002). This issue was not raised below, as the petitioners "have challenged the authority to enter into tribal-state compacts in general, rather than the authority to negotiate for particular games." Karr Pet. App. A at A11 n.4; Dalton Pet. App. D at 16a n.4 Therefore, it is not properly presented here.

Court of Appeals. Therefore, because there is no conflict for this Court to resolve, it should deny these petitions.

II. Petitioners' Other Arguments Provide No Basis For Granting Review

Petitioners contend that plenary review is warranted for a host of other reasons. As explained below, most are irrelevant, and none has merit.

A. IGRA Does Not Violate State Sovereignty

Both the Dalton and Karr petitions contend that application of ordinary principles of pre-emption in this case would improperly "empower" the New York Legislature to act in violation of the State Constitution. Petitioners' arguments fall wide of the mark.

Petitioners do not dispute that, in the absence of IGRA, Indian tribes would be permitted to operate casinos on tribal land free of any regulation by the states. As this Court has stated: "The whole intercourse between the United States and [Indian] nation[s], is, by our Constitution and laws, vested in the government of the United States." *McClanahan*, 411 U.S. at 169. Under the Indian Commerce Clause, states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe*, 517 U.S. at 62.

By enacting IGRA, Congress afforded the states a role (if they choose to accept it) in the regulation of Indian gaming that they would not otherwise have had. IGRA does not force a state to accept a particular compact or compel the state to regulate Indian gaming on behalf of the Federal Government. To be sure, if state officials do not negotiate with Indian tribes, or if they do so in bad faith, the Secretary of the Interior may simply *direct* that gaming be allowed—a point petitioners concede. Dalton Pet. 7; Karr Pet. 16. Thus, petitioners are reduced to arguing that state sovereignty would

not be violated if Congress simply ignored the states and directed that gambling be permitted nationwide on tribal lands, but that state sovereignty somehow is violated here because Congress has given states the opportunity to participate in the process. *See* Karr Pet. 6-7. This makes little sense as a matter of logic and is incorrect as a matter of law. *See New York v. United States*, 505 U.S. 144, 167 (1992) ("[W]e have recognized Congress' power to offer States the choice of regulating [ ] activity according to federal standards or having state law pre-empted by federal regulation."); *see also Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 764-65 (1982) (holding that rather than entirely pre-empting a field, Congress may adopt a less intrusive scheme that would allow states to participate in regulation).

Moreover, even if petitioners' characterization that the New York Legislature has been "empowered" by IGRA were accurate, that would not amount to a constitutional violation in any event. This Court has never held that application of ordinary pre-emption principles in a way that alters otherwise governing state law is unconstitutional. *See Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (invalidating Arkansas workers' compensation statute, which authorized the state to offset benefits received under federal statute, because it conflicted with federal Benefits Act); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that Oklahoma could not require cable operators to delete advertisements for alcoholic beverages contained in out of state programming because Oklahoma's prohibitions were pre-empted by federal law).

Petitioners also argue that New York has been compelled by Congress to engage in conduct against the will of state officials and the citizens of New York who elected them. *See* Dalton Pet. 20. However, petitioners' argument ignores the fact that the New York Legislature voluntarily enacted the law they now challenge. The Legislature—a rep-

resentative body elected by, and accountable to, the people of New York—has now affirmed, in the clearest possible terms, that it wants Indian casino gambling in New York State. If, as petitioners insist, the Governor and Legislature have violated the will of the people, the problem is properly addressed through the electoral process.

B. The Decision Below Is Entirely Consistent With This Court's Rulings On Federalism And State Sovereignty

The Dalton petition suggests that the decision below "undermines this Court's recent rulings reaffirming the concepts of federalism and dual sovereignty." Dalton Pet. 19. Petitioners characterize these cases as "protect[ing] the states against unwarranted usurpations of their prerogatives by an overreaching Congress," and then assert that application of ordinary principles of federal pre-emption in this case amounts to an "unwarranted usurpation" of state power. *Id.* at 19-21. This argument, however, is contradicted by petitioners' own claim that IGRA has improperly "empowered" state legislatures. Moreover, petitioners have not and cannot identify a state power that has been "usurped" here, as the power to regulate Indian tribes and their activities on their lands is not a power "reserved to the States" under the Tenth Amendment. U.S. Const. Art. I, § 8, cl. 3; *id.* Art. II, § 2, cl. 2; *see also Cabazon*, 480 U.S. at 207 ("'[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'").

Contrary to petitioners' contention, the lower court's decision is entirely consistent with this Court's rulings on federalism and state sovereignty. Indeed, this Court has consistently upheld legislation, like IGRA, that allows the states the option of assuming a regulatory role in a pre-emptable area.

Only where, unlike here, legislation directly compels the states to enact and enforce a regulatory program has this Court intervened. For example, in *New York v. United*

States, 505 U.S. 144 (1992), this Court reaffirmed that Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161. In *New York*, the Court invalidated the "take-title" provision of the Low-Level Radioactive Waste Policy Act, which forced the state to choose between enacting a federal regulatory program or taking title to radioactive waste. *Id.* at 176-77. This Court found that because Congress could not constitutionally impose either option, presenting states with a choice between these two options was also impermissible. *See id.* The Court reached a similar conclusion in *Printz v. United States*, 521 U.S. 898 (1997), where the Court held that certain interim provisions of the Brady Handgun Violence Prevention Act which would require state law enforcement officers to conduct background checks for prospective handgun purchasers were unconstitutional because those provisions would have compelled law enforcement officials to participate in a federal regulatory scheme.

In contrast, state sovereignty is not infringed by statutes such as IGRA that invite the states to regulate in an otherwise pre-emptable field. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), this Court considered provisions of the Surface Mining Control and Reclamation Act which prescribed federal minimum standards governing surface coal mining which a state could either implement itself or else yield to a federally administered regulatory program. This Court rejected coal producers' Tenth Amendment challenge to these provisions, finding that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. Similarly, in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) ("*FERC*"), this Court upheld provisions of the

Public Utility Regulatory Policies Act of 1978, which require states to consider adopting federal rate structures and regulatory standards. The Court found that the Act "should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards." *Id.* at 765 (emphasis in original).

Like the statutes in *Hodel* and *FERC*, IGRA does not compel the states to enact or enforce a federal program. Rather, Congress has given states a power—the ability to exercise some degree of regulation over gaming activities on tribal lands—that they would not otherwise possess under the Constitution. If the states choose not to exercise this power, the only consequence is that they lose their ability to influence the terms under which gaming will occur. *See* 25 U.S.C. § 2710(d)(B)(vii); *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (holding that IGRA does not violate the Tenth Amendment because IGRA "gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries, but does not compel it"); *Yavapi-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (rejecting a Tenth Amendment challenge because "IGRA's terms do not force the State to enter into a compact").

Accordingly, IGRA's statutory scheme, which gives states a potential role in regulating gaming on Indian lands where they would otherwise have none, cannot possibly offend state sovereignty under the Tenth Amendment.

C. There Are No Issues Of State Concern Presented By This Case

Petitioners contend that there are issues of state concern that should be resolved by this case. As explained below, none of these purported issues supports review by this Court.

a. The Dalton petition devotes several pages to quoting from a National Governors Association position paper addressing Indian gaming and taxation. *See* Dalton Pet. 15-18. The paper in question, however, simply notes that the Association is focusing on implementing IGRA, not that further guidance from this Court is needed. Indeed, the Governors acknowledge that once the scope of permissible gaming in a state is determined, "States and tribes can then negotiate to operate those gaming activities and devices in the state."[5]

b. The Dalton petition notes that a group of state attorneys general filed an *amicus* brief in *Seminole Tribe* and suggests that the same issues are implicated here. But *Seminole Tribe* was decided nearly a decade ago and presented very different issues than this case. Moreover, the Attorney Generals' complaint regarding state sovereignty in *Seminole Tribe* was that a state was not only encouraged to enter into a compact but could be coerced into engaging in negotiations with Indian tribes because otherwise it could be "hauled into federal court under a claim it failed to negotiate in good faith." Brief of Amicus Curiae States of California et al., 1995 WL 17008502, at *25, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). This Court resolved that concern in *Seminole Tribe* by precluding Indian tribes from directly suing states without the states' consent. *See* 517 U.S. at 761.

c. Petitioners also point to various states' laws and constitutional provisions that limit gambling activity, while allowing that gambling to be conducted by charitable or other organizations. These state laws, however, are not cause for any "concern" or "confusion," nor are they of any signifi-

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[5] National Governors Ass'n, The Role of States, the Federal Government, and Indian Tribal Governments with Respect to Indian Gaming and Taxation Issues § 6.5.1, *available at* http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnextoid=2caa9e2f1b091010VgnVCM1000001a01010aRCRD.

cance here, as petitioners have cited no case—and we are aware of none—where any court anywhere has ever held that a state may prevent Indian tribes from conducting types of gaming that it permits any other party within the state to conduct. The Dalton petitioners maintain that the application of IGRA creates an "awkward" situation for governors whose states' gambling regulations are pre-empted by federal law. As previously explained, however, states and their governors do not have authority to regulate gaming on Indian lands, except to the extent agreed to by a tribe and state in the compacting process. Therefore, this purported "awkwardness" cannot be a reason for granting review. Dalton Pet. 18.

D. The Court Of Appeals Correctly Interpreted IGRA

Finally, the Dalton petition contends that the New York Court of Appeals misapplied IGRA in concluding that, "if Class III gaming is permitted in the state for any purpose, including a strictly charitable purpose, it will be permitted on Indian land with or without the state's involvement." Dalton Pet. 21 (quoting Dalton Pet. App. D. at 18a-19a). But the language of the statute is crystal clear. Indian tribes will be permitted to conduct Class III gaming on tribal lands when "located in a State that permits such gaming for *any purpose by any person, organization, or entity*." 25 U.S.C. § 2710(d)(1)(B) (emphasis added); Karr Pet. App. A at A12; Dalton Pet. App. D at 16a.

Petitioners ignore IGRA's plain language and would have this Court read "such gaming" and "any purpose" to mean "commercial gaming" and "commercial purpose." As the New York Court of Appeals and other courts have recognized, petitioners' tortured interpretation of IGRA would render this provision meaningless. *See* Karr Pet. App. A at A14; Dalton Pet. App. D at 18a-19a, *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990) (holding that because Connecticut law permitted certain "games of

chance" at charitable "Las Vegas nights," and allowed other forms of gambling, Indian tribes were also permitted to conduct those games under IGRA). Although petitioners insist that IGRA's legislative history supports their position, *see* Dalton Pet. 21, that history, in fact, makes clear that Congress *did not* intend to distinguish between prohibited "commercial gambling" and permitted "charitable gambling" within the same state. As the United States Senate explained in enacting IGRA:

> The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

S. Rep. No. 100-446, at 12, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082; Karr Pet. App. A at A11 n.3; Dalton Pet. App. D at 15a n.3 ("Although the portion of the legislative history specifically discussing the prohibitory/regulatory distinction was referring to Class II gaming, the applicable language in IGRA is virtually identical with respect to Class II and Class III gaming.") (citations omitted).[6]

In any event, a statute's legislative history "makes no difference" where, as here, the language is clear. *Toibb v. Radloff*, 501 U.S. 157, 164 (1991).

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[6] *See also Mashantucket*, 913 F.2d at 1029-30 (finding the legislative history of Section 2710(b)(1)(A) "instructive with respect to the meaning of the identical language" in Section 2710(d)(1)(B)); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 485 (D. Wis. 1991) ("Although the Senate committee was speaking of class II activities, its comments are equally applicable to the requirements for class III activities.").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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